THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.345 OF 2005

S.Sant Singh @ Pilli Singh Ajit Singh Kalyani, aged years, residing permanently at Shikakani Vashi, Survey No.110, Romm Tekdi, Hadapsar, Pune and at present lodged at Yerwada Central Prison, Prisoner No.C/12822, Pune-411006. ..Petitioner.

Versus

1. The Secretary, Home Department, Govt. of Maharashtra Mantralaya, Mumbai ..Respondent No.1

2. The Dy.Inspector General of Prison ..Respondent No.2

3. The Superintendent of Police, Yerwada Central Prison ..Respondent No.3

4. The State of Maharashtra (at the instance of Wanwadi Police St. Pune, vide CR No.166 of 1999. ..Respondent No.4

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Mrs. Harjeet Kaur with A.S.Anand for Petitioner

Mr.S.R.Borulkar Public Prosecutor with Mr.Mhaispurkar and Smt.P.H.Kantharia APP for Respondents

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CORAM: V.G.PALSHIKAR,Acg.C.J.,
D.B.BHOSALE AND SMT.
V.K. TAHILRAMANI,JJ.

DATED : 22ND DECEMBER, 2005

ORAL JUDGMENT [PER SMT.V.K.TAHILRAMANI,J]:

1. Heard the learned advocate for the petitioner and the learned Public Prosecutor for Respondents. Rule. Rule made returnable forthwith. Respondents waive service, By consent matter is heard finally.

2. By his judgment and order dated 30.4.2002 the learned Sessions Judge convicted the petitioner under Section 302 of IPC. The said judgment and order was challenged by the petitioner in an appeal which is pending before this Court. During the pendency of the appeal, the petitioner preferred application for parole on the ground that his wife was required to be operated. The said application came to be rejected. Against the said order of rejection, the petitioner preferred writ petition before this Court. The said writ petition came to be rejected as the petitioner had remedy of

preferring appeal against the order of rejection of parole. Thereafter, the petitioner preferred an appeal to the State Government which came to be rejected. Being aggrieved by the said order of the State Government rejecting his application for parole leave, the present petition has been preferred by the petitioner.

3. The application for parole came to be rejected on two grounds. The first ground was that there are other relatives to take care of his ailing wife and hence the presence of the petitioner was not required. The second ground was that the authorities did not have the jurisdiction to entertain grant of parole leave during the pendency of his appeal before this Court.

4. The matter came up before the Division Bench of this Court. At that time, the learned Additional Public Prosecutor submitted that in view of the decision of this Court in the case of **Jayant Veerappa Shetty and another Vs. The State of Maharashtra and others, reported in 1986 Cri. L.J. 1298 = 1986 (1) Bom.C.R.311**, the authorities have no jurisdiction to entertain an application for parole and grant parole leave during the pendency

of his appeal before this Court. Hence, the petitioner cannot raise any grievance against the orders passed by the authorities rejecting his application for grant of parole.

5. The Division Bench of this Court in the case of Jayant Veerappa Shetty (supra), has held that the Prisons (Bombay Furlough and Parole) Rules, 1959 (hereinafter referred to as 'Prison Rules') would not apply to the grant of parole to a convicted person whose appeal is pending before the appellate Court and when the appellate Court is in seisin of the matter and it is empowered under Section 389 of the Code of Criminal Procedure, 1973 to pass appropriate orders.

6. In the present matter, the Division Bench vide its order dated 13.4.2005 was of the opinion that "the view taken by the earlier Division Bench in **Jayant Veerappa Shetty's** case that the rules regarding furlough and parole leave would not apply to the convicted person whose appeal is pending before the Appellate Court" appears to have been taken without considering the provisions of Section 432 of Cr.P.C.before arriving at the said conclusion.

7. In the present case, the Division Bench, was not in agreement with the view of the earlier Division Bench in the case of **Jayant Veerappa Shetty** and by its order dated 13.4.2005, directed the Registrar to place the case before The Honourable the Chief Justice for reference to a Full Bench to resolve the controversy as to whether the provisions of the Prisons (Bombay Furlough and Parole) Rules, 1959 would stand suspended in cases of the convicts who prefer appeal and once the appellate authority is in seisin of the matter and till the disposal of the appeal.

8. The issues which we formulate for decision so as to resolve the controversy, are as under:

1) Whether the Division Bench in the case of **Jayant Veerappa Shetty and Another Vs. The State of Maharashtra and others,** did not refer to or consider the provisions of Section 432 of Code of Criminal Procedure ?

2) Whether the grant of parole amounts to

suspension of sentence within the meaning of Section 432 of Code of Criminal Procedure ?

3) Whether the view taken by this Court in **Jayant Shetty's** case that the Prison Rules would not apply to the grant of parole to a convicted person whose appeal is pending before the Appellate Court when it is empowered to pass appropriate orders under Section 389 of Code of Criminal Procedure, requires to be reconsidered?

4) Whether the competent authorities have the power to entertain an application for parole when the appeal preferred by the petitioner-convict is pending before this Court ?

9. We have heard the learned advocate Ms.Kaur for the petitioner as well as the learned Public Prosecutor Mr.Borulkar on the above law points.

10. On behalf of the Respondent-State, an

affidavit has been filed by Shri.P.R.Harchande, Desk Officer, Home Department (Jail) Government of Maharashtra. Two fold contentions have been raised in the said affidavit. The first is that the sister, mother and other relatives of the petitioner are available to take care of his ailing wife and therefore the presence of the petitioner is not necessary. The second contention is that the petitioner's appeal challenging the order of conviction is pending before this Court and in view of the pendency of the appeal, the petitioner cannot be released on parole in view of the Government Circular bearing reference No.PAR/4584/3(712)-PRS-3 dated 17.9.1985 issued by the Home Department, Government of Maharashtra, Mumbai. The said circular is based on the decision of this Court in the case of Jayant Shetty.

11. Ms.Kaur the learned advocate for the petitioner has submitted that in view of Section 432 of Code of Criminal Procedure even though the appeal against the conviction of the petitioner is pending before this Court, still the authorities have jurisdiction to entertain the application for parole of the petitioner-convict Under Section 432 of Cr.P.C.

12. Mr.Borulkar, the learned Public Prosecutor inspite of the stand taken in the affidavit, has supported the stand taken by Ms.Kaur and stated that though the appeal preferred by the petitioner against his conviction is pending before this Court, the authorities still have jurisdiction to entertain the application for parole. He submitted that in view of the provisions of Section 432 of the Code of Criminal Procedure, the State Government can grant parole to a convict prisoner even though his appeal is pending before this Court. However, he did not substantiate this submission.

13. Before we advert to the controversy before us, we may indicate in short, the scheme in respect of parole leave granted to convicted persons. In exercise of powers conferred by clauses (5) and (28) of Section 59 of the Prisons Act, 1894 (IX of 1894), in its application to the State of then Bombay, the Government of then Bombay framed the Prison Rules. Rules 18 to 28 which deal with parole are as under:

. **18. Authorities competent to sanction parole.--** The authority competent to sanction release of a convicted prisoner on parole (hereafter referred to as "the Competent Authority") shall be :--

. (i) the State Government in the following cases:-

. (a) prisoners convicted by Courts situated outside the State of Maharashtra,

. (aa) prisoners convicted by courts situated within the State of Maharashtra, but confined in prisons situated outside the State,

. (b) prisoners convicted by political offences,

. (c) any other case or class of cases wherein the State Government has directed that the case or specified class of cases wherein the State Government has directed that the case or specified class of cases be referred to it for orders,

. (ii) The Commissioner of the Division, in all other cases in a Division, in which the convicted prisoner is confined, or when the Divisional Commissioner is out of headquarters, the Additional Divisional Commissioner:

. Provided that if an application for release on parole or for an extension of the period of parole is refused by the Divisional Commissioner or the Additional Divisional Commissioner, as the case may be, an appeal shall lie to the State Government, whose decision thereon shall be final.

. (2) Notwithstanding anything contained in sub-rule (1), the Superintendent of Prison shall also be the Competent Authority to release a convicted

prisoner on parole for a period not exceeding fifteen days, in case of death of his close relation i.e. father, mother, brother, sister, spouse or child of the prisoner.

. **19. When a prisoner may be released on parole --** A prisoner may be released on parole for such period not exceeding thirty days at a time as the Competent Authority referred to in rule 18, in its discretion may order, in cases of serious illness, or death of nearest relative such as mother, father, sister, brother, children, spouse of the prisoner, or in case of natural calamity such as house collapse, floods, fire. No such parole or extension of parole shall be granted without obtaining a police report in all cases except in the case of death of his nearest relatives mentioned above.

. **20. Parole not to be counted as remission of sentence.**-- The period spent on parole shall not count as remission of the sentence.

. **21. Application for grant of parole--** A prisoner may be granted parole either on his own application or on an application made by his relatives or friends, or legal adviser.

. **22. Applications for parole how to be dealt with.**--(1) Any prisoner desiring to be released on parole shall ordinarily submit his application (in triplicate) in Form D appended to these rules to the Superintendent of Prison who shall endorse his remarks thereon and submit one copy direct to the Competent Authority along with the nominal roll of the prisoner and the other to the District Superintendent of Police of the district in which the prisoner proposes to spend his parole period and to the Commissioner of Police if such place is in Greater Bombay.

. Note.-- Prisoners who apply for parole on false grounds or who, abuse the concession or commit breach of any of the conditions of parole are liable to be punished under Section 51-B of the Prisons Act, 1894, as applicable to the State of Bombay.

. (2) The District Superintendent of Police concerned or the Commissioner of Police, Bombay, as the case may be, shall immediately make enquiries to ascertain whether the ground or grounds on which parole is applied for is or are genuine and submit immediately his report to the Competent Authority mentioning inter alia whether it recommends the grant of parole and also whether there is a likelihood of breach of peace if the prisoner is released on parole.

. **23. Enquiries may be made on receipt of application.--** On receipt of an application for parole, the Competent Authority may make such enquiries as it considers necessary, and pass such orders as it considers fit. If the Competent Authority considers that there is no objection to release the prisoner concerned on parole it shall make an order for his release on parole.

. **24. Conditions subject to which prisoners may be granted parole.--** The Competent Authority may grant parole to a prisoner subject to his executing a surety bond and a personal bond in Forms A and B respectively to observe all or any of the conditions mentioned therein and also subject to such other conditions, if any, as may be specified by the Competent Authority:

. Provided that when prisoners convicted of serious offences are released on parole, a condition shall be included in the parole order directing or requiring the prisoner to report at

the Police Station nearest to the place where he intends to spend his parole initially on his reaching such place and thereafter once or twice a week at such intervals as may be considered expedient:

. Provided further that when a prisoner applies for parole for the purpose of appearing at an examination he will not be eligible to be released on parole unless the Inspector - General of Prisons has passed an order permitting him to appear at such examination:

. **25. Extension of the period of parole.**--The Competent Authority may, on the application made by the prisoner or by his relatives or friends or legal adviser, one week in advance, before the expiry of the period of parole granted by an order in writing, extend the period of parole for such further period or periods as may be specified in such order, on the same grounds, and on the same conditions on which the prisoner was originally granted parole, or on such other conditions as the Competent Authority may determine:

. Provided that the total period of parole so extended shall not exceed ninety days."

. **26. Parole order ineffective on prisoner's surrender,**--- As soon as a prisoner released on parole surrenders to the Prison Authority, his original order of release will be inoperative. Where, therefore, a prisoner who is released on parole has applied for the extension of the period of parole and before his application has been sanctioned surrenders himself to the Prison authority, he shall not be released after such surrender without obtaining a fresh release order passed by the Competent Authority.

. **27. Intimation of release and of non-surrender of a prisoner.--** (1) Whenever any prisoner is released on parole, an intimation of his release on parole shall forthwith be given by the Superintendent of Prison to the authority which granted him parole and copies thereof shall also be sent--

. (i) to the Inspector-General of Prisons,

. (ii) to the District Magistrate and the District Superintendent of Police of the District in which the prisoner intends to spend his parole and if the prisoner intends to spend his parole in Greater Bombay, to the Commissioner of Police.

. (2) Where a prisoner does not surrender himself to the prison authorities after the expiry of the period of parole, the Competent Authority may, if it is satisfied that any of the conditions on which the parole was granted has not been fulfilled cancel its order granting such parole. An intimation regarding such cancellation shall forthwith be given by the Superintendent of Prison to the officers specified in clause (ii) of sub-rule (1). Upon such intimation, the police authorities may arrest the prisoner, if at large, and remand him to undergo the unexpired portion of his sentence.

. **28. Application of certain rules to parole cases,--** The provisions of rules 8(5), 10,11 and 12 shall mutatis mutandis apply in the case of release of prisoners on parole.

14. It would also be useful at this stage to reproduce the provisions of Sections 389(1) and 432 of the Code of Criminal Procedure.

. **"389 Suspension of sentence pending the appeal; release of appellant on bail,--**

. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

. **432. Power to suspend or remit sentences,--**

. (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

. (2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was, had confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

. (3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour

the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

. (4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

. (5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

. Provided that in the case of any sentence (other than a sentence of fine) passed on male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and,--

. (a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

. (b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

. (6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

. (7) In this section and in section 433, the expression ‘‘appropriate Government" means,--

. (a) In cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

. (b) In other cases the Government of the State within which the offender is sentenced or the said order is passed."

15. Thus Rules regarding parole are set out from Rules 18 to 28. Rule 18 prescribes the competent authority for grant of parole over which there is no dispute before us. Rules 19 and 25 have been amended in 1989 by the Prisons (Bombay Furlough and Parole) (Amendment) Rules, 1989 by Notification in the Official gazette dated 21.11.1989 issued by the Home Department, Mantralaya, Mumbai. Earlier Rules 19 and 25 read as under:

. **19. When a prisoner may be released on parole --** A prisoner may be released on parole for such period as the Competent Authority referred to in rule 18 in its discretion may order, in cases of serious illness, or death of any member of the prisoner's family or of his nearest relatives or for any other sufficient cause.

. **25. Extension of the period of parole.**-- The Competent Authority may, on the application of the prisoner or otherwise, by an order in writing,

> extend the period of parole for such further period or periods as may be specified in such order on the same conditions on which the prisoner was originally granted parole or on such other condition as the Competent Authority may determine."

The amended Rule 19 has added three very important provisions i.e.

(i) it sets out the specific cases in which parole can be granted;

(ii) it provides for police report; and

(iii) it states the period for which parole can be granted.

Rule 19 states that parole cannot be granted for more than thirty days at a time. Rule 25 provides the maximum period for which parole can be extended. These provisions were not there in the earlier Rules.

16. In the Indian Judicial System, normally a person would be a prisoner in the following cases:

(a) If he is a detenu;

(b) If he is a pre-trial prisoner;

(c) after conviction;

The last category can be further

divided into three parts:

(i) Prisoners whose appeals are pending;

(ii) Prisoners whose bail applications have been rejected by the High Court;

(iii) Prisoners whose convictions have been confirmed by the High Court;

Rule 18 of the Prison Rules makes it very clear that the competent authority can grant parole only to a convict.

17. Rules 1 to 17 of the Prison Rules deal with furlough. The question whether Furlough can be granted when the appeal of a prisoner is pending came up for consideration before the Division Bench of this Court in the case of **Sharad Bhiku Marchande Vs. State of Maharashtra reported in 1991 Cri.L.J. 2109.** After considering the decision in the case of Jayant Shetty (supra) it was held in the case of Sharad Marchande that an application for furlough cannot be rejected on the ground that a prisoners appeal is pending before the Court. We are in respectful agreement with the view taken by the Division Bench in the case of Sharad Marchande (supra) that as furlough is granted as of right, the Government cannot refuse

to grant furlough to a convict whose appeal is pending and this position in law has been well recognised by this Court. Thus, we have to now only consider whether Parole can be granted to a prisoner during the period that his appeal is pending.

18. ‘Furlough’ and ‘parole’ are two distinct terms now being used in the Jail Manuals or laws relating to temporary release of prisoners. These two terms have acquired different meanings in the statute with varied results. Dictionary meanings, therefore, are not quite helpful.

19. ‘Parole’ is defined in Black’s Law Dictionary as "a conditional release of a prisoner, generally under supervision of a parole officer, who has served part of the term for which he was sentenced to prison". Parole relates to executive action. Historically ‘parole’ is a concept known to military law and denotes release of a prisoner of war on promise to return. Parole has become an integral part of the English and American systems of criminal justice intertwined with the evolution of changing attitudes of the society towards crime and criminals. As a consequence of the

introduction of parole into their penal system, all fixed-term sentences of imprisonment of above 18 months are subject to release on licence, that is, parole is granted after a third of the period of sentence has been served. In those countries, parole is taken as an act of grace and not as a matter of right and the convict prisoner may be released on condition that he abides by the promise. It is a provisional release from confinement but is deemed to be a part of the imprisonment. Release on parole is a wing of the reformative process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is thus a grant of partial liberty or lessening of restrictions on a convict prisoner, but release on parole does not change the status of the prisoner.

20. However, the concept of parole under the English law, the American law and the Indian law is quite different. Under the English Law, parole is granted to a convict who has undergone major part of his sentence. It is a reformative process on account of the changing attitude towards crime and criminals. Parole under those systems is a provisional release from jail but it is deemed to

be part of the imprisonment. A convict is supposed to maintain good behaviour during this period and not abuse the liberty granted to him in any manner, otherwise he would be called back to serve out the remaining part of his imprisonment. However, under the Indian system a convict can be released on Parole only in case of the contingencies mentioned in Rule 19. It is a temporary release granted on account of contingency and after the period of parole is over the convict has to report back to prison to undergo the remaining part of his sentence. Thus, though the concept of Parole differs under the Indian system and other systems, one similarity is that Parole does not amount to suspension of sentence and the person is deemed to be undergoing imprisonment during the period that he is on parole.

21. Bail and parole have different connotation in law. Bail is well understood in Criminal Jurisprudence and Chapter XXXIII of Cr.P.C. contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after the trial. Bail is granted by the officer in charge of a police

station or by the court when a person is arrested. The Court grants bail when a person apprehends arrest in a case of a non-bailable offence. When a person is convicted of an offence he can be released on bail by the appellate court till his appeal is decided. If he is acquitted his bail bonds are discharged and if his appeal is dismissed he is taken into custody. Bail can be granted subject to conditions. After granting of bail, if the accused is released from custody, still the Court would retain constructive control over him through the sureties. In case, the accused is released on his own bond such constructive control would still be exercised through the conditions of the bond secured from him. Parole, however, has a different connotation from bail even though the substantial legal effect of both bail and parole may be the release of a person from detention or custody. "Parole" is a form of "temporary release" of a convict from custody which provides conditional release from custody and changes the mode of undergoing sentence.

22. It is seen that ‘bail’ and ‘parole’ operate in distinct fields although, the ultimate end is

the release of the prisoner on certain terms and conditions. There is clear distinction between 'parole' and 'bail'. 'Parole' has nothing to do with the actual merits of the matter i.e. the evidence which has been led against the convicted prisoner but 'parole' is granted in cases of emergency like death, illness of near relative or in cases of natural calamity such as house collapse, fire or flood. It is pertinent to note that in case of death of near relative, the Superintendent of Prison shall also be competent to release the convict on parole for a period not exceeding 15 days. Parole is resorted to in cases of contingency. Looking to this fact it would not be expedient for the convict to approach the Courts and pray for temporary release especially in cases of death. The Prison Rules take care of such emergencies.

23. Thus, Bail and Parole operate in different spheres and in different situations. In India, there are no statutory provisions dealing with the question of grant of parole. The Code of Criminal Procedure does not contain any provision for grant of parole. By an administrative instruction, however, rules have been framed in various States

regulating the grant of parole. Thus, the action of grant of parole is generally speaking an administrative action.

24. Undoubtedly, Section 389 empowers the Court to suspend the sentence and even the conviction but if there is no such suspension, the Competent Authority or the Government's powers under Section 432 Cr.P.C. are not curtailed in any manner nor there is an embargo on its powers merely because the appeal against the conviction is pending. It is another story when the sentence is suspended and the convict is ordered to be released on bail. Certainly such an order could prevail over the powers of the Government but in the absence of such an order, the Government's powers under Section 432 of Cr.P.C. are not curtailed.

25. Section 432 of the Code of Criminal Procedure falls within Chapter XXXII, which contains provisions regarding "execution, suspension, remission and commutation of sentences". Sub-section (1) of Section 432 empowers the appropriate Government to "suspend" the execution of the sentence or "to remit" the punishment to which he has been sentenced. Thus Section 432

confers powers on the executive authority to suspend or remit the punishment conditionally or unconditionally. Suspension means a stay of the execution of the sentence. Remission means reducing the amount of sentence without changing its character e.g. two years rigorous imprisonment to one year rigorous imprisonment. Commutation means change of the punishment to a less severe one e.g. Death sentence to life imprisonment. The Supreme Court in a decision by the Constitution Bench in the case of **Sunil Fulchand Shah Vs. Union of India, reported in 2000 S.C.C. (Cri.) 659,** has categorically observed that parole does not amount to suspension of sentence. From this it becomes clear that parole cannot be covered by Section 432 of Cr.P.C.

26. The provisions of law clearly disclose that once a person is convicted and sentence is imposed by the Court, and such person is sent to jail as a prisoner the execution of the sentence imposed upon him is to be done by the appropriate Government in accordance with the rules framed in that regard. Once a person is in prison he would be governed by the Prisons Act, and the Rules framed thereunder. The Prison Rules clearly

provide for grant of parole. It is for the Competent Authority or the Government to decide as to whether any Parole for any particular period is to be granted to the convicts undergoing imprisonment period and on the conditions as may be fixed. It is, therefore, clear that merely because a convict prefers an appeal before the Appellate Court, that would not divest the Government of its powers under the Prison Act to deal with the management of the convict by following the rules framed under the said Act.

27. From this, it is clear that the powers of the State to grant Parole are not fettered even if the appeal of the convict is pending before the Court. Thus, the Competent Authority or the Government would have the legal competence to entertain an application for parole by following the procedure set out under the Prison Rules to meet the contingencies stated therein. The exercise of such power would not be in any way be in conflict with the powers exercised under Section 389 and/or Section 432 Cr.P.C. It is also evident that the amendments carried out in this scheme of Rules 19 and 25 in the year 1989 have provided for adequate safe guards so as to ensure that the benefit of

parole leave is not misused or abused so as to defeat or nullify the Court's order passed under Section 389 Cr.P.C. as was noticed in Jayant Shetty's case (supra).

28. The judgment in the case of **Jayant Shetty** (supra) appears to have been influenced by the peculiar facts of that case and the legal position prevailing at that time. In the said case, 'Parole' was granted to dreaded criminals, who were gang leaders. The bail granted to them was cancelled by the High Court. Parole was granted even before seeking the views of the police in respect of grant of parole. The grant of parole was opposed by the Commissioner of Police and the Commissioner of Police stated that parole which was granted, should be cancelled. Inspite of this, extension of parole of one month was granted. In the said case, parole and extension was granted on entirely frivolous grounds i.e. on recommendations of MLAs whose recommendations did not bear out the true state of facts. At the time when the decision in the case of **Jayant Shetty,** was rendered, it is seen that there were no checks in respect of grant of parole by the Competent Authority. Earlier Rules did not provide for the

maximum period for which parole could be granted. The earlier Rule 19 was rather vague in the sense that it provided that parole could be granted "for any other sufficient cause". Thus, it was left to the Competent Authority's discretion to grant parole in any case and thus, there was danger of misusing the said power. The amended Rule 19 clearly provides that parole can be granted only in case of death or serious illness of near relatives or in case of natural calamity. The near relatives have been specifically set out in the Rules. The most important check is that the amended Rules provide that except in case of death, parole cannot be granted without obtaining a police report. The provision of the obtaining a police report was not there in the earlier Rules. The provision of obtaining police report would ensure that police would point out the antecedents of the person, whether any bail if granted to the person has been cancelled. The police would also point out any other reason in view of which it would not be expedient to grant parole. Thus, amended rule 19 provides for three checks viz.;- (1) it sets out the specific cases in which the parole can be granted; (2) it provides for a specific period for which parole can be granted

and (3) it specifically states that no parole shall be granted except in cases of death without obtaining a police report. These three safeguards to our mind, are sufficient. These safeguards were not in existence when the decision in the case of **Jayant Shetty** was rendered and hence, it appears that decision in the case of **Jayant Shetty,** was rendered in view of the prevailing legal position at that time and the peculiar facts of that case.

29. One other fact which appears to have weighed while rendering the decision in **Jayant Shetty's** case is the decision of the Apex Court in the case of **K.M.Nanavati Vs. State of Bombay, reported in A.I.R. 1961 SC 112**. A specific reference has been made to the decision in the case of K.M. Nanavati. In the said case, the provisions of Section 432 of Cr.P.C. i.e. old Section 401 and present Section 389 of Cr.P.C. i.e. old Section 426 of Cr.P.C. fell for consideration. After considering the said decision, the Division Bench in the case of **Jayant Shetty** reproduced the following para from **K.N.Nanavati's** case:-

. " Section 426, therefore, deals specifically with a situation in which an appeal is pending and the Appellate Court has seisin of the case and is thus, entitled to pass such orders as it thinks fit and proper to suspend a sentence. It will thus be seen that whereas Chapter XXIX in which Section 401 occurs, deals with a situation in which pendency of an appeal is not envisaged, Section 426 deals with a situation in which pendency of an appeal is postulated. In other words, Chapter XXIX deals with persons sentenced to punishment for an offence simplicitor in general term whereas Section 426 deals with a special case and therefore, must be out of the operation of Section 401. But it has been vehemently argued by the learned Advocate General that the words "at any time" indicate that the power conferred by Section 401 may be exercised without any limitation of time. In the context of Section 401 "any time" can only mean after conviction, because there cannot be any sentence before conviction. The question then is: "Does it cover the entire period after the order of conviction and sentence even when an appeal is pending in the Appellate Court and Section 389 can be availed of by the appellant?".

. . It will be seen that Section 426 is as unfettered by other provisions of the Code as Section 401 with this difference that powers under Section 426 can only be exercised by an appellate court pending an appeal. When both the provisions are thus unfettered, they have to be harmonised so that there may be no conflict between them. They can be harmonised without any difficulty, if Section 426 is held to deal with a special case restricted to the period while the appeal is pending before an

> appellate Court while Section 401 deals with the remainder of the period after conviction. We see no difficulty in adopting this interpretation nor is there any diminution of powers conferred on the executive by Section 401 by this interpretation. The words "at any time" emphasise that the power under Section 401 can be exercised without limit of time but they do not necessarily lead to the inference that this power can also be exercised while the court is seized of the same matter under Section 389".
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> [Emphasis supplied]

. The Division Bench in **Jayant Shetty's** case in fact relied on the last sentence underlined above to come to the conclusion that powers under Section 432 Cr.P.C. cannot be exercised by the Government when the Court is seized of the matter under Section 389 of Cr.P.C. It is to be noted that the Supreme Court in the case of **K.M.Nanavati (supra)**, was not considering the power of Competent Authority or the Government to grant parole, but it was considering the powers of the Governor to suspend/remit the sentence. Thus, the decision in the case of **K.M.Nanavati (supra),** would not be applicable to any case of grant of parole by the Government irrespective of the fact whether the appeal is pending or not. As stated earlier, parole does not amount to suspension of

sentence. It has been so held by the Constitution Bench of the Supreme Court in the case of **Sunil Fulchand Shah (supra).** Thus, the Court in the case of **Jayant Shetty,** has erred in placing reliance on the decision of the **K.M.Nanavati**, while considering whether the Government can grant parole in a case where the appeal is pending. In our view, this reasoning is totally incorrect because Section 432 Cr.P.C. deals with the powers of the Government to remit or suspend the sentence of a convict. Parole does not amount to suspension or remission and hence, it would not fall under Section 432 of Cr.P.C.

30. In respect of parole the Constitution Bench of the Supreme Court in the case of **Sunil Fulchand Shah Vs. Union of India,** reported in 2000 S.C.C. (Cri.) 659 has categorically observed that "parole" is a form of "temporary release" from custody, which does not suspend the sentence or period of detention. From this it is clear that parole does not amount to suspension of sentence. Parole clearly does not fall under remission of sentence. Remission means reducing the period of sentence without changing its character e.g. two years rigorous imprisonment to one year rigorous

imprisonment. Thus, as parole does not fall under either of the two categories i.e. suspension or remission, it would not be covered by Section 432 of Cr.P.C.

31. Section 432 Cr.P.C. deals with Government's powers to remit or suspend sentence. As parole does not amount to remission or suspension of sentence parole would not be covered under Section 432 of Cr.P.C. From this, it follows that the Government has no powers to grant parole under Section 432 of Cr.P.C. However, Government or Competent Authority can grant parole to convicts under the Rules framed under the Prisons Act. The power of the executive to grant parole under the Prisons Act and Rules would not create any conflict with the power of the Court to grant bail or suspend the sentence or conviction under Section 389 of Cr.P.C. In any case there is always the remedy of Judicial review.

32. In the premises and with great respect, we do not find ourselves in agreement with the view recorded by the Division Bench in Jayant Shetty's case (supra).

33. As far as Question No.1 is concerned, i.e. the observation that the decision was taken by the Division Bench in **Jayant Shetty's** case without considering the provisions of Section 432 of Cr.P.C. as recorded in the reference order dated 13.04.2005 made by the subsequent Division Bench in the instant petition are in our humble view incorrect.

34. In conclusion, the issues framed by us are answered as under:

1. The decision in Jayant Shetty's case had considered the scheme of Section 432 and 389 Cr.P.C. i.e. old Sections 401 and 426 Cr.P.C.

2. The grant of parole does not amount to suspension of sentence as contemplated by 432 Cr.P.C.

3. The view taken in Jayant Shetty's case is no more a good law.

4. The Competent Authority has the power to grant parole under the Prison Rules framed under the Prisons Act.

35. In view of the above discussion, we answer question No.4 in the affirmative i.e. the authorities have the power to entertain and grant an application for grant of parole even though the appeal of the petitioner is pending before the appellate Court.

36. In the present case, the appeal of the petitioner for grant of parole came to be rejected on 30.9.2004. As mentioned earlier, the application for parole was made on the ground of ill health of his wife. Now more than a year has elapsed since then. In this view of the matter if at present the health of wife of the petitioner is serious, the petitioner would be at liberty to make a fresh application for parole annexing recent medical certificates in support of his claim that she is serious. If any such application is preferred by the petitioner, the

respondents shall dispose of the same expeditiously.

37. In this view of the matter, instead of sending the petition back to the Division Bench, we dispose of the same as nothing further survives in this petition.

38. Rule is decided in terms of our findings. Petition is disposed of with the above directions.

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